

MARK SCHEME for the October/November 2007 question paper

9084 LAW

9084/03

Paper 3 (Law of Contract), maximum raw mark 75

This mark scheme is published as an aid to teachers and candidates, to indicate the requirements of the examination. It shows the basis on which Examiners were instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began.

All Examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes must be read in conjunction with the question papers and the report on the examination.

- CIE will not enter into discussions or correspondence in connection with these mark schemes.

CIE is publishing the mark schemes for the October/November 2007 question papers for most IGCSE, GCE Advanced Level and Advanced Subsidiary Level syllabuses and some Ordinary Level syllabuses.



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Assessment Objectives

Candidates are expected to demonstrate:

Knowledge and Understanding

- recall, select, use and develop knowledge and understanding of legal principles and rules by means of example and citation.

Analysis, Evaluation and Application

- analyse and evaluate legal materials, situations and issues and accurately apply appropriate principles and rules.

Communication and Presentation

- use appropriate legal terminology to present logical and coherent argument and to communicate relevant material in a clear and concise manner.

Specification Grid

The relationship between the Assessment Objectives and this individual component is detailed below. The objectives are weighted to give an indication of their relative importance, rather than to provide a precise statement of the percentage mark allocation to particular assessment objectives.

| Assessment Objective | Paper 1 | Paper 2 | Paper 3 | Paper 4 | Advanced Level |
|--------------------------------------|---------|---------|----------------|---------|----------------|
| Knowledge/ Understanding | 50 | 50 | 50 | 50 | 50 |
| Analysis/ Evaluation/ Application | 40 | 40 | 40 | 40 | 40 |
| Communication/ Presentation | 10 | 10 | 10 | 10 | 10 |

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Mark Bands

The mark bands and descriptors applicable to all questions on the paper are as follows. Maximum mark allocations are indicated in the table at the foot of the page.

Indicative content for each of the questions follows overleaf.

Band 1: The answer contains no relevant material.

Band 2: The candidate introduces fragments of information or unexplained examples from which no coherent explanation or analysis can emerge.

OR

The candidate attempts to introduce an explanation and/or analysis but it is so fundamentally undermined by error and confusion that it remains substantially incoherent.

Band 3: The candidate begins to indicate some capacity for explanation and analysis by introducing some of the issues, but explanations are limited and superficial.

OR

The candidate adopts an approach in which there is concentration on explanation in terms of facts presented rather than through the development and explanation of legal principles and rules.

OR

The candidate attempts to introduce material across the range of potential content, but it is weak or confused so that no real explanation or conclusion emerges.

Band 4: Where there is more than one issue, the candidate demonstrates a clear understanding of one of the main issues of the question, giving explanations and using illustrations so that a full and detailed picture is presented of this issue.

OR

The candidate presents a more limited explanation of all parts of the answer, but there is some lack of detail or superficiality in respect of either or both so that the answer is not fully rounded.

Band 5: The candidate presents a detailed explanation and discussion of all areas of relevant law and, while there may be some minor inaccuracies and/or imbalance, a coherent explanation emerges.

Maximum Mark Allocations:

| Question | 1 | 2 | 3 | 4 | 5 | 6 |
|-----------------|----------|----------|----------|----------|----------|----------|
| Band 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| Band 2 | 6 | 6 | 6 | 6 | 6 | 6 |
| Band 3 | 12 | 12 | 12 | 12 | 12 | 12 |
| Band 4 | 19 | 19 | 19 | 19 | 19 | 19 |
| Band 5 | 25 | 25 | 25 | 25 | 25 | 25 |

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Section A

- 1 In Gibson v Manchester City Council (1979), Lord Denning expressed a view that in determining whether a contract was formed, the court should look at all the negotiations between the parties, rather than simply at offer and acceptance.**

Evaluate the arguments for and against the view expressed in this case by Lord Denning.

There are many contracts that do not fall neatly into concepts of offer and acceptance. Contracts for the sale of land are classic examples, but there are many others (e.g. Clarke v Dunraven) where the circumstances are far from clear-cut and where the concepts would have to be stretched and artificially interpreted. It is in this context that Denning spoke out in the Gibson case.

Denning's view has both supporters and critics, but has on the whole been rejected by the courts as being too uncertain and allowing judges too much discretion. Candidates should explore the alternative all or nothing approach of offer and acceptance and consider what should happen if, applying the rules, there is clearly no binding contract and yet allowing a retraction from an agreement would cause hardship. Candidates who have read widely may mention the notion of quasi – contracts in such circumstances and should be given credit for it.

It is sometimes useful, however, for courts to be more objective and look beyond offer and acceptance to the intention of the parties. In some instances, parties may be in agreement and yet no actual contract was intended.

Informed debate and a clear evaluation of points raised are expected.

- 2 Innocent parties to a breach of contract are entitled to such damages as will put them in the position that they would have been in if the contract had been performed.**

Using case law to support your arguments, analyse the extent to which this statement can be substantiated.

Candidate response ought to analyse the three principal limitations on the recovery of losses in this context: causation, remoteness and mitigation.

Causation in contract should be clearly explained and the effect of intervening acts explored (e.g. County Ltd v Girozentrale Securities). The defendant must have been the direct cause of the claimant's loss.

Remoteness should be defined and explained. It would clearly be unfair to make defendants compensate for losses that could not have been foreseen as a real danger. Key cases of Hadley v Baxendale, The Heron II and Victoria Laundries (Windsor) Ltd v Newman Industries should be outlined, compared, contrasted and conclusions drawn.

Complainants are expected to make reasonable efforts to mitigate or minimize losses suffered. In fairness, to all, courts will dismiss claims where there have been no reasonable steps taken to keep losses down to a minimum (Pilkington v Wood; Brace v Calder).

Candidates who simply consider the means of calculating loss and distinguish between expectation and reliance loss and comment thereon can attain no better than marks within band 3.

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3 Critically assess the extent to which the doctrine of equitable or promissory estoppel prevents a party to a contract from enforcing his or her rights under it.

Candidates are expected to set the question in context by saying that this is an equitable doctrine introduced by the High Trees Case as a means of mitigating undue hardship (at least temporarily) that would result from the strict application of the rules of consideration in the law of contract.

The rule itself should be stated and explained and candidates should then, using relevant case law, go through situations in which the doctrine will not apply, i.e. where there is no pre-existing contract, where a promise has place no reliance on the promise to forego strict rights, where it would be inequitable to allow the doctrine to apply etc.

It is anticipated that candidates will conclude that the doctrine has a limited yet very important effect.

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Section B

4 Using case law, advise the parties concerned whether a valid contract was formed.

Candidates will undoubtedly recognise that a binding contract only comes into existence if there has been a firm offer made which has been unconditionally accepted. There is clearly an unequivocal offer made on very definite terms, the sale of 500 cases of wine @£20 less 30% per case, which appears to have been communicated by an offeror to an offeree. The issue of contract, therefore, is whether or not the offer gets unconditionally accepted.

In this case, the terms of the offer do not seem to stipulate how any acceptance should be communicated, only that the offer will only last as long as stocks do, thus implying that however it is done, it should be done quickly. A1 Wines decide to accept by fax, sending a fax message immediately that they are aware of the offer. The issue here is whether an acceptance is deemed effective from the time that it is sent or from the time that it is received and the offeror is aware that the offer has been accepted.

Candidates should discuss, and illustrate with case law, the general rule of acceptance: that acceptance is effective once it has been communicated to the offeror. (*Entores Ltd v Miles Far East Corporation*.) Candidates could then look at the only exception granted by the posting rule (*Adams v Lindsell*, *Henthorn v Fraser*; *Household Fire Insurance v Grant*, etc) and consider whether acceptances made by fax are subject to the general rule or the posting rule of acceptance.

As fax is, like telephone and telex, an effectively instantaneous means of communication, with no inevitable delay between transmission and receipt, the postal rule is unlikely to apply, so any acceptance made by this means would not be effective until the offeree is aware of it (*Entores Ltd v Miles Far East Corporation*). There is no case law on when an acceptance by fax is binding, but even if deemed effective from the time that the offices in Australia opened, it would appear that a contact was made between offeror and offeree. The fact that the fax was erroneously destroyed would appear to be of no importance. However, as the special price wine has all gone by the time the error is discovered, there would be little that A1 Wines can do except to claim damages.

Clear compelling, supported conclusions are to be expected.

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5 Consider whether Pablo is liable in contract for the losses sustained by Maria.

The anticipated focus of this question are the issues of causation and remoteness of damage and mitigation, even if candidates do introduce terms and the issue of whether a breach of contract actually occurred. Assuming that terms had been communicated and that Pablo was indeed in breach, the main issue is the extent to which Pablo might be held liable for the consequential losses sustained by Maria.

Candidates should identify damages as the principal remedy for breach of contract and explain that their aim is to compensate for losses that result from not receiving the performance that was bargained for. The general rule is that, subject to certain limitations, innocent parties are entitled to such damages as will put them in the position that they would have been in had the contract been performed.

The issue here would seem to revolve around whether any of the limitations would be applicable to the facts of this case or whether Pablo would simply be liable for the losses that Maria has allegedly sustained.

Was Pablo's breach the cause of Maria's losses? On the face of it, it would appear that they were as there was no obvious intervening act to break the chain of causation (County Ltd v Girozentrale Securities).

Were Maria's losses too remote from their cause to be recoverable? Were they reasonably foreseeable consequences of the breach (Hadley v Baxendale; The Heron II) or were they losses arising from special circumstances that could not have been foreseen (Victoria Laundry (Windsor) Ltd v Newman Industries Ltd)?

Did Maria do all that she could do to mitigate the effects of the breach (Brace v Calder)?

Two of the losses sustained were pecuniary ones and provided that the above tests are satisfied, compensation should be granted. However it would seem likely that any claim for the mental distress that she has suffered would not be compensated as it is a commercial contract (Addis v Gramophone Co Ltd).

Informed debate followed by clear, compelling conclusions is expected.

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6 Using case law, advise Leroy and Maisie of their respective rights with regard to the ownership of the antique cricket bat.

The facts of this case suggest that Leroy has been the subject of a fraudulent misrepresentation of identity. This would render a contract voidable, but as the fraud has not been discovered until after Maisie has purchased the cricket bat in good faith from Winston. The Sale of Goods Act 1979 provides that good title passes from seller to buyer in these circumstances, so Maisie would have every legal right to refuse to hand over the cricket bat to Leroy unless he pays for it.

The only circumstances under which Leroy could legally demand that Maisie returns the cricket bat to him is if he can establish that the original contract between Winston and himself was founded on an operative unilateral mistake as to identity of the other party to the contract. This would render the original contract void, no ownership rights would then have passed between Leroy and Winston and consequently, again under the Sale of Goods Act, no ownership rights could be passed on to Maisie.

The decisions in Phillips v Brooks and Lewis v Avery suggest that operative mistake will only be recognized in these circumstances if the identity of the other party was of material importance to the contract. So, in this case, Leroy would have to prove that he intended to make this contract with Leroy and essentially would not have contracted with him if he thought that he was anyone else. If it is apparent that the identity of 'Richie' was only of importance when it came to making payment, then any action based in mistake would fail as it would then be clear that Leroy was prepared to make the contract with anyone.

Informed debate followed by clear, compelling conclusions is expected.